

To: Sunshine Reform Task Force Members
From: Closed Session Committee
(Susan Goldberg, Karl Hoffower, and Mary Ann Ruiz)
Date: February 20, 2007
Subject: "Closed Session" Committee Recommendations

The Closed Session Committee met on February 13, 2007. The Committee considered Susan Goldberg's comments dated January 11, 2007 while following the approach suggested by Ed Davis, counsel to the Task Force, at the meeting on January 18, 2007.

Mr. Davis's suggested outline for discussion is attached as Attachment 1.

A list of the Task Force's decisions made on January 18, 2007 is attached as Attachment 2.

A proposed ordinance incorporating the decisions of the Task Force to date as well as the recommendations of the Committee is attached as Attachment 3.

The Closed Session Committee makes the following recommendations (following the items listed in Ed Davis's outline):

4. Specific topics in closed session

a. Discipline/Evaluations

The Committee recommends that discipline of Council Appointees be disclosed in open session as part of the report after closed session. (See Section 6(A)(4) of the proposed ordinance which is attached as Attachment 3.)

b. Real estate

The Committee recommends that in addition to limiting closed session discussions about real estate negotiations to price and terms of payment, the ordinance should specifically prohibit any discussion of the source of funds from which payment would be made. (See Sections 3(C)(2) and 4(A)(1) of the proposed ordinance which is attached as Attachment 3.)

c. Labor

The Committee recommends that all proposed contracts with represented and unrepresented employees and the Council Appointees be approved by the policy body in open session. Notice must be 10 days for contracts that are under \$1M and 14 days for contracts over \$1M before the contract is scheduled to be discussed

in open session. (See Section 5(B) of the proposed ordinance which is attached as Attachment 3.)

d. Litigation

The Committee recommends that all proposed settlements \$50,000 or more be approved by the policy body in open session. Notice must be 10 days for settlements that are under \$1M and 14 days for settlements over \$1M before the agreement is scheduled to be discussed in open session. (See Section 5(C) of the proposed ordinance which is attached as Attachment 3.)

5. Certification

a. How it works

The Committee recommends the procedure described by Ed Davis in his outline and explained in more detail at the meeting on January 18, 2007: The default is that the recording is made available unless certified. If certified, the City Attorney must state (1) the reason why non-disclosure is in the public interest and (2) when the need for non-disclosure will no longer exist. (See Section 7(A) of the proposed ordinance which is attached as Attachment 3.)

b. Who enforces

The Committee recommends that appeal of the City Attorney's decision be made to three retired judges. One judge will be selected by the City Council and one judge will be selected by the Sunshine Ordinance Commission. These two judges will select the third judge. (See Section 7(C) of the proposed ordinance which is attached as Attachment 3.)

Ed Davis's Suggested Outline for Discussion

1. Agenda Requirements – adopt Susan Goldberg's suggestions?
2. Prohibit closed session of all City bodies except those so authorized
3. For those bodies where sessions can be closed, limit to specific topics
- intent was to limit to the same topics as the Brown Act
4. Specific topics in closed session
 - a. Discipline/Evaluations
 - b. Real estate
 - c. Labor
 - d. Litigation
5. Certification
 - a. How it works

The default is that the recording is made available unless certified

If certified, the City Attorney must state (1) the reason why non-disclosure is in the public interest and (2) when the need for non-disclosure will no longer exist
 - b. Who enforces

Decisions Made at the January 18, 2007 Meeting

As a reminder, the Task Force made the following decisions at the January 18, 2007 meeting:

1. Agenda Requirements

The Task Force agreed with Ed Davis's suggestion that counsel incorporate Susan Goldberg's suggestions into the proposed ordinance. (See Sections 1(A), 1(A)(2), 1(A)(3)(a), 1(A)(4), 1(A)(6) and 1(A)(7) of the proposed ordinance which is attached as Attachment 3.)

2. Prohibit closed session of all City bodies except those so authorized

The Attorney's Office explained to the Task Force that the San Jose Arena Authority is another body that holds closed session.

The Task Force agreed that the policy bodies that are permitted to go into closed session and the reason why the bodies hold closed session should be specified in the proposed ordinance. (See Sections 3(A) and 3(B) of the proposed ordinance which is attached as Attachment 3.)

3. For those bodies where sessions can be closed, limit to specific topics
The Task Force accepted counsel's representation that the intent of the proposed ordinance was to limit the topics of closed session to the same topics as the Brown Act.

The Task Force agreed that the proposed ordinance should clarify that the proposed ordinance limits the topics of closed session to the same topics as the Brown Act. (See Section 3(C) of the proposed ordinance which is attached as Attachment 3.)

4. Specific topics in closed session

a. Discipline/Evaluations

i. Discipline

After much discussion (including who exactly was the subject of closed session), **the Task Force made two recommendations about discipline of Council Appointees:**

(a) Return with language to require a report out of discipline when information is presented and a disciplinary action is taken, including a discussion on the right to privacy and the extent that the city can protect itself from liability by informing City employees that they should have no expectation of privacy;

(b) Defer action until staff returns with objective standards to define “substantiated” or “well founded” and discussion of legal liability and due process issues.

ii. Evaluations

The Task Force agreed that performance evaluations of Council Appointees should not be disclosed in open session as part of the report after closed session.

b. Real estate

The Task Force agreed:

- i. **Closed session about real estate negotiations may not address any subjects other than instructions from the policy body to its negotiators about the price and terms of payment (with an understanding that price necessarily includes a discussion on potential use of property). (See Section 3(C)(2) of the proposed ordinance which is attached as Attachment 3.)**
- ii. **Policy bodies must identify the properties at issue and any development plans in open session (within the constraints of CEQA), so that proposed development of property being considered for purchase or sale cannot be discussed in closed session. (See Section 4(A)(1) of the proposed ordinance which is attached as Attachment 3.)**
- iii. **All proposed agreements must be approved by the policy body in open session. Notice must be 10 days for purchases that are under \$1M and 14 day for purchases over \$1M before the agreement is scheduled to be discussed in open session. (See Section 5(A) of the proposed ordinance which is attached as Attachment 3.)**